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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

CHRISTOPHER MICHAEL SALON & SPA  
and FARMERS INSURANCE COMPANY,

Petitioners,

v.

WORKERS' COMPENSATION APPEALS  
BOARD and AMY MITCHELL,

Respondents.

F045364

(WCAB No. FRE 0202184)

**OPINION**

**THE COURT\***

ORIGINAL PROCEEDINGS; petition for writ of review. Keigo Obata,  
Administrative Law Judge.

Yohman, Parker, Kern, Nard & Wenzel and Kirsten K. Corey, for Petitioners.

No appearance by Respondent Workers' Compensation Appeals Board.

Lawrence T. Musso, for Respondent Amy Mitchell.

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Christopher Michael Salon & Spa and its workers' compensation insurer Farmers Insurance Company (Petitioners) request this court to inquire into and determine the lawfulness of a decision of the Workers' Compensation Appeals Board (WCAB). (Lab.

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\* Before Levy, Acting P.J., Gomes, J. and Dawson, J.

Code,<sup>1</sup> § 5950; Cal. Rules of Court, rule 57.) Petitioners contend the WCAB misapplied section 5710 and Code of Civil Procedure section 2025, by ordering the payment of attorney fees associated with a deposition where the deposed injured worker never reviewed and signed the transcription. We will deny the petition and remand the matter to the WCAB to award supplemental attorney fees.

### **BACKGROUND**

Amy Mitchell (Mitchell) sustained an admitted cumulative trauma injury to her left upper extremity in April 2001 while working as a massage therapist for the Christopher Michael Salon & Spa in Dublin, California. Petitioners scheduled a deposition with Mitchell on June 27, 2002, which she and her attorney Lawrence T. Musso (Musso) attended. The deposition transcript recorded Mitchell was sworn under oath before her examination. At the conclusion of the 2 hour and 45 minute deposition, Petitioners' counsel, Kirsten K. Corey (Corey), offered the following stipulation:

“MS. COREY: Okay. At this time, I would like to relieve the court reporter of her duties and stipulate an original and a copy to be sent to Mr. Musso's office; that your client, Mr. Musso, will have 30 days from the date of the transmittal to review and make any changes; that should an original not be available or unsigned, we'll stipulate that a certified copy will be used in lieu of an original for all purposes?

“MR. MUSSO: So stipulated.

“MS. COREY: Okay.”

On July 1, 2002, Musso sent Corey a request for payment of \$956.25 for Musso's services in connection with the deposition. Corey responded on July 23, 2002:

“I have recently received Ms. Mitchell's deposition transcription taken June 27, 2002. At your earliest convenience, please advise my office when Ms. Mitchell has reviewed and signed her deposition.”

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<sup>1</sup> Further statutory references are to the Labor Code unless otherwise indicated.

Musso apparently did not reply and instead petitioned the WCAB on September 30, 2002, to order Petitioners to pay the requested attorney fees plus costs. On October 8, 2002, Corey filed a Declaration of Readiness to Proceed (DOR) with the WCAB and objected to the petition on the grounds Mitchell had not reviewed and signed her deposition testimony. Corey did not dispute the amount of the fee and assured the WCAB Petitioners would render payment once Mitchell reviewed and signed the transcription.

On February 11, 2003, Musso filed his own DOR because “defendant has refused to pay 5710 Fees and a DOR was previously filed with no action.” Ten days later, Musso petitioned the WCAB to impose sanctions under section 5813 for Petitioners’ unreasonable delay tactics.

After a mandatory settlement conference and a hearing submitted on the documentary evidence, a workers’ compensation administrative law judge (WCJ) ruled that “[t]he reasonable time period within which to pay attorney’s fees under Labor Code Section 5710 after billing is 20 days after applicant reviews, executes, and returns the deposition to defendant.” As Mitchell had not yet reviewed, executed and returned a signed deposition, the WCJ found penalties unwarranted. The WCAB, however, granted reconsideration and on March 9, 2004, reversed the WCJ’s decision by awarding Musso his requested deposition related attorney fees.

## **DISCUSSION**

Petitioners contend the WCAB possesses the express authority and discretion under section 5710 to require Mitchell to sign and review a transcription before attorney fees must be paid, that the legislative intent of Code of Civil Procedure section 2025, mandates that Mitchell review and sign her testimony, and that Mitchell’s failure to do so prejudiced petitioners. We disagree.

Section 5710 provides in relevant part:

“(a) The appeals board, a workers' compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the

appeals board, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure....

“(b) Where the employer or insurance carrier requests a deposition to be taken of an injured employee, or any person claiming benefits as a dependent of an injured employee, the deponent is entitled to receive in addition to all other benefits:

“[¶] ... [¶]

“(4) A reasonable allowance for attorney’s fees for the deponent, if represented by an attorney licensed by the State Bar of this state. The fee shall be discretionary with, and, if allowed, shall be set by, the appeals board, but shall be paid by the employer or his or her insurer.”

In denying the petition for reconsideration, the WCAB relied on its significant panel decision issued four days earlier in *Lett v. Workers’ Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 250, “holding that the discretionary allowance of attorney’s fees under Labor Code section 5710 was *not* contingent on whether an applicant signed his or her deposition.” Quoting from *Lett*, the WCAB explained:

“ ‘Labor Code section 5710 requires only that the employer or insurance carrier requests a deposition be taken of the injured worker. Here, the applicant’s deposition was taken and therefore, the requirements for setting a fee were satisfied. Labor Code section 5710 contains no requirement that an applicant must sign his or her deposition as a condition precedent to allowing reasonable attorney’s fees.’<sup>2</sup>

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<sup>2</sup> Labor Code section 5710(a) authorizes “the deposition of witnesses residing within or without the state to be taken *in the manner* prescribed by law for like depositions in civil actions in the superior courts of this state under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure.” (emphasis added.) Thus, it would appear that Labor Code section 5710 incorporates the deposition *procedures* set forth in the Code of Civil Procedure and not its substantive provisions. (See *Allison v. Workers’ Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 64 Cal.Comp.Cases 624, 630 (fn. 7); *Moran v. Bradford Building, Inc.* (1992) 57 Cal.Comp.Cases 273 (Appeals Board en banc).)

“ ‘Moreover, even assuming that the substantive provisions of the Code of Civil Procedure are applicable to workers’ compensation proceedings, Code of Civil Procedure section 2025(q)(1) provides that the deponent “may either approve the transcript of the deposition by signing it, or refuse to approve the transcript by not signing it,” and that if “the deponent fails or refuses to approve the transcript within the allotted period, the deposition shall be given the same effect as though it had been approved, subject to any changes timely made by the deponent.”

“ ‘In other words, Code of Civil Procedure section 2025(q)(1) allows the deponent not to sign his or her deposition, with the consequence that deposition is given the same effect as if it had been signed. Thus, whether the applicant signs his or her deposition, should have no bearing whatsoever on the discretionary allowance of a reasonable fee under Labor Code section 5710 for attorney services rendered in connection with that deposition, which was taken at the behest of the defendant employer or carrier.

“ ‘Furthermore, this defendant’s reliance on *People v. Post* (2001) 94 Cal.App.4th 467, 66 Cal.Comp.Cases 1503 is completely misplaced. In *Post*, the Court of Appeal affirmed the applicant’s conviction of workers’ compensation fraud under Insurance Code section 1871.4(a)(1) for making false statements and misrepresentations about her physical condition in her *unsigned* deposition. The Court also held that while Ms. Post could not be convicted of perjury in violation of Penal Code section 118 when she did not sign her deposition transcript,<sup>3</sup> she could be convicted of attempted perjury. Thus, the alleged public policy concerns of defendant (who has not asserted that there are any material misrepresentations in the applicant’s deposition) with respect to workers’ compensation fraud are not only speculative, but are wholly unfounded. In addition, defendant has failed to show how it is prejudiced in any way by the applicant’s failure to sign his deposition.’ ”

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“<sup>3</sup> This is because under Penal Code section 124, a conviction for perjury requires that the deponent execute his or her deposition transcript. (See *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 66 Cal.Comp.Cases 706.) The Court in *Post*, however, also urged the Governor and legislators to reevaluate the signature and delivery requirements of Penal Code section 124, noting that in federal courts the crime of perjury is complete once a materially false statement is spoken at a deposition and there is no requirement the transcript be executed by the deponent. ([94 Cal.App.4th at p. 484;] 66 Cal.Comp.Cases at p. 1515.)

Petitioners admit that section 5710, subdivision (b)(4), “gives the Appeals Board the express authority to authorize when attorney’s fees shall be paid and shall be discretionary as well[,]” yet continue to argue the WCAB’s exercise of that discretion here is contrary to legislative intent and public policy. As the WCAB explained, however, nothing in section 5710, Code of Civil Procedure section 2025, or *People v. Post, supra*, 94 Cal.App.4th at page 467 mandates that a deponent must ever sign and execute her deposition testimony. Petitioners do not point to any legal authority to refute the WCAB’s reasoning.

Petitioners also suggest the WCAB committed prejudicial error by not requiring Mitchell to sign and execute her deposition, which precluded them from litigating and obtaining a conviction for perjury. The issue of perjury, however, was not before the WCAB and is therefore not before this court. If Petitioners possess evidence of Mitchell’s inconsistent statements, they may -- and should -- provide such evidence to the WCAB before it weighs the ultimate disability issues. We find no prejudice, however, by Petitioners’ inability to seek a criminal conviction for perjury, particularly when a less than truthful deponent who refuses to sign a deposition nevertheless remains at risk for attempted perjury (Pen. Code, §§ 118, 664) and workers’ compensation insurance fraud (Ins. Code, § 1871.4). (*People v. Post, supra*, 94 Cal.App.4th at pp. 475-483.)

Petitioners claim they should not reimburse Musso for the costs associated with representing Mitchell at her deposition is particularly meritless considering the parties’ stipulation, offered by their counsel, that “a certified copy will be used in lieu of an original for all purposes” should an original deposition be unavailable or unsigned within 30 days from the date of transmittal. Because the parties agreed the deposition would be self-executing upon Mitchell’s failure to sign the transcription document, we find no reasonable basis for their refusal to reimburse its associated costs and for this petition for writ of review. (§ 5801.)

### **DISPOSITION**

The petition for writ of review is denied. Under authority of section 5801, we find no reasonable basis for the petition and remand the matter to the Workers' Compensation Appeals Board to award supplemental attorney fees for services rendered in answering the petition for writ of review. This opinion is final forthwith as to this court.